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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1942.

—  
No. **895**  
—

SHERMAN L. RUMBERGER, *Petitioner*,

v.

JOHN H. WELSH, PARISE TRUCKING COMPANY,  
INC., and LOUIS C. PARISE, *Respondents*.

—  
**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT AND BRIEF IN SUP-  
PORT THEREOF.**  
—

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JOHN S. FLANNERY,  
G. BOWDOIN CRAIGHILL,  
R. AUBREY BOGLEY,  
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**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT.**

Petitioner, Sherman L. Rumberger, respectfully prays that a Writ of Certiorari issue to the United States Circuit Court of Appeals for the Second Circuit to review the final judgment entered in the above cause on November 16, 1942, the Order for Mandate having been filed December 9, 1942, and the time for filing this petition having been extended to and including April 8, 1943, by Order dated the 1st day of March, 1943, signed by Associate Justice Robert H. Jackson.

**Summary Statement of Matter Involved.**

Petitioner, plaintiff-appellee below, brought suit in the District Court of the United States for the Eastern District of New York to recover damages for permanent injuries caused by the falling of a boom, which was a part of the

equipment of a truck on which he was riding. Judgment was entered on a \$15,000 verdict in petitioner's favor, against respondents, defendants-appellants below, John H. Welsh, Parise Trucking Company, Inc., and Louis C. Parise (R. 461).

The truck was owned by the Parise Trucking Company and driven by its employee, Louis C. Parise. The truck and driver were hired by John H. Welsh, who was under contract with The Long Island Railroad Company to furnish trucks and chauffeurs, including one with winch and boom, for use in a grade crossing elimination program upon which the Railroad was engaged, pursuant to the New York City Grade Crossing Elimination Act (L. 1928, Ch. 677, § 2, Subd. 8).

At the time of his injury, petitioner, with other employees of The Long Island Railroad Company, was riding on the truck engaged in transporting large reels of cable from a storage yard to the scene of operations. Parise alone operated the winch and boom and alone handled the lines in making the boom secure for travel (R. 42)

At the conclusion of the evidence, counsel for respondent Welsh, moved for a directed verdict, without stating specific grounds therefor. (R. 403) Upon rendition of the verdict in favor of petitioner, counsel for respondent Welsh, in the following language, moved to set aside the verdict:

"Now, on behalf of the defendant Welsh I move to set aside the verdict as against the weight of evidence under the appropriate section of the Federal Court Code, and on the ground that it is contrary to the evidence, contrary to the weight of evidence and contrary to the law." (R. 434)

Both of these motions were denied without argument. (R. 403, 435)

Neither in open Court, nor by written document filed within ten days after verdict, did counsel for respondent Welsh move for judgment *non obstante veredicto* as con-

templated by Rule 50(b) of the Federal Rules of Civil Procedure.

The United States Circuit Court of Appeals for the Second Circuit, in the decision now sought to be reviewed (R. 475-479), which is reported in 131 F. 2d at page 384, held that Welsh, a special employer of Parise, was not responsible for Parise's negligence in improperly securing the boom for travel, and directed that as to Welsh the judgment be reversed and the complaint dismissed. No consideration was given by the Circuit Court of Appeals in its opinion to the necessity for remanding for a new trial. The verdict and judgment against Parise Trucking Company, Inc. and Louis C. Parise were allowed to stand.

The opinion of the Circuit Court of Appeals gives a full outline of the facts, which will be hereinafter more fully set forth in petitioner's brief in support of this petition to the extent that they are pertinent.

### **Basis for Jurisdiction.**

It is competent for this Court to require by certiorari that the cause be certified to it for review pursuant to the Act of February 13, 1925, c. 229, § 1, 43 Stat. 938, amending and re-enacting Section 240(a) of the Judicial Code, 28 U. S. C. A. § 347, and Rule 38 of the Rules of this Court.

### **Questions Presented.**

Two important questions of Federal Law are presented here involving the very foundation of our judicial system, the Constitutional right to a jury trial. The questions presented are:

1. Whether the Circuit Court of Appeals misconstrued and misapplied the Law of New York, as established by the decisions of the Courts of that State, in holding as a matter of *law* that Welsh was a special employer and as such not responsible for the negligence of Parise which resulted in petitioner's injuries, thereby denying to petition-

er his right to a jury trial, in violation of the Seventh Amendment of the Federal Constitution.

2. Whether the Circuit Court of Appeals, upon reversal of the judgment of the District Court, may direct the dismissal of the complaint, instead of remanding for a new trial, where the party against whom judgment was rendered in the District Court neglected to properly move for a directed verdict and failed to move within ten days after judgment to have the verdict and judgment set aside and judgment entered in his favor notwithstanding the verdict, as provided by new Federal Rule 50. Otherwise stated, whether a party need not request or the District Court consider the entry of a judgment *non obstante veredicto* in order to permit the Circuit Court of Appeals to find that such judgment should have been entered, thus attributing to the District Court error in failing to do that which it never was asked to do.

### **Reasons Relied on for the Allowance of the Writ.**

1. It is important, in order that jury trial may be preserved as contemplated by the Seventh Amendment of the Federal Constitution, that this Court shall determine whether the Circuit Court of Appeals has misconstrued the New York law and decided as a matter of law an issue which, petitioner contends, was a question of fact properly submitted to and determined by the jury.

2. The decision of the Circuit Court of Appeals is in conflict with applicable decisions of the New York Courts holding that whether or not an employee is in the employment of a special employer and *subject* to his orders and control is a question of fact to be determined by the jury.

3. The decision sought to be reviewed involves an important question arising under Rule 50 of the new Federal Rules of Civil Procedure concerning which the Circuit Courts of Appeals are not in harmony, and which has been



before this Court in several cases reviewed on writs of certiorari but not determined because the cases were decided on other points.

*Berry v. United States*, 312 U. S. 450, 452.

*Conway v. O'Brien*, 312 U. S. 492, 493.

*Halliday v. United States*, 315 U. S. 94, 96.

WHEREFORE, petitioner prays for the allowance of a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit in this cause in order that it may be reviewed and determined by this Honorable Court.

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